IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1625 of 2004
With
CRIMINAL APPEAL No. 1193 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GIRISHBHAI RANCHHODBHAI PATEL & 6 - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MR VH PATEL PATEL for Appellants
MS DS PANDIT, ADDL.PUBLIC PROSECUTOR for Respondent

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 26/09/2007

COMMON ORAL JUDGMENT

1. Both these appeals are preferred against the

order of conviction and sentence passed by the learned Joint District Judge and Additional Sessions Judge [Fast Track Court No.5] Bharuch. The appellants of Criminal Appeal No. 1625 of 2004 are original accused nos. 1 and 2 of Sessions Case No. 4 of 2004 and the appellants of Criminal Appeal No. 1193 of 2007 are original accused nos. 1 to 5 of Sessions Case No. 5 of 2004. Both the said Sessions Cases were tried jointly and decided by a common judgment under challenge. Initially, the appellants of Criminal Appeal No. 1193 of 2007 had challenged the very judgment and order along with two other accused persons of Sessions Case No. 4 of 2004 but when it came to the notice of the learned counsel appearing for the appellants that appellant nos. 3 to 7 were the accused persons of different Sessions Case, separate appeal, to put the records straight has been preferred and thus, both these appeals are heard together after deleting the names of the appellant nos. 3 to 7 from the cause title of Criminal Appeal No. 1625 of 2004.

2. All the accused persons have been held guilty of the charge of offences punishable under Sections 143, 147, 148, 323, 307 and 397 read with Section 149 of I.P.C. All the accused have been directed to undergo imprisonment for a period of 7 years qua the offences punishable under Section 397 read with Section 149 of the I.P.C.; for 5 years for the offences punishable under Sections 307 read with Section 149 of I.P.C.; to pay fine of Rs. 500/- each for the offences punishable under Section 143 of I.P.C. and to pay fine of Rs. 1,000/- each for the offences punishable under Section 148 of I.P.C. The accused are also directed to pay fine of Rs. 500/- each for the offences punishable under Sections 397 and 307 of I.P.C. Respectively. In default of fine as stated above, punishment is imposed for same period for all the offences, that is, six months' simple imprisonment. Except accused no.4 Nipunchandra @ Montu Bharatbhai Kansara, rest of the accused persons were enlarged on bail pending trial and after the order of conviction, they have been granted

bail by this Court. The said accused no. 4 was in prison since the date of his arrest but thereafter, considering the period for which he remained in jail, this Court granted bail to the said accused. Therefore, he is also enjoying the bail. Rest of the accused persons being piecemeal, they were charge sheeted differently and obviously therefore, they were committed by two different orders of committal to the Court of Sessions. Consequently, two different Sessions Cases were registered. However, both the said Sessions Cases have been tried and decided simultaneously.

3. Mr. V.H. Patel, learned counsel appearing for the appellants in both the appeals has taken me through various grounds of challenge mentioned in the memos of appeals, so also through the relevant part of the judgment. It is submitted by Mr. Patel that none of the important witnesses who could be said to be independent witnesses, has supported the case of the prosecution. Even the injured victim has not named any of the accused as assailants or

persons responsible to the injury inflicted on him on the date of the incident. According to Mr. Patel, it was not even the case of the accused persons before the trial court that the incident has not occurred in the manner in which it has been described by the complainant, but because of number of lacunas and infirmities in the evidence led by the prosecution, accused ought not to have been connected with the crime. It was also submitted before the trial court that there was probability of false implication of the accused and the incident was relating to communal disturbance that had taken place on the day of Bharat Bandh call and the police was under tremendous pressure and obligation to resolve the registered crime, because, it has come in the evidence that the victim was assaulted near the area where special chocky, that is, fixed point was established in order to prevent any untoward incident and therefore, active workers of Bhartiya Janata Party were implicated by the police, otherwise, police officer who had visited the injured when he was

in the hospital at Amod itself could have collected the names of the assailants. It is neither the case of the prosecution nor it was contended before the Court that the victim was not knowing any of the accused by name. Some of them were important figures in public life and therefore, it was easy for the injured and other persons who had accompanied the victim to hospital to name the assailants. It was submitted that this was the case of delayed FIR.

4. It was further submitted by Mr. Patel that the learned trial Judge has accepted the evidence of police witnesses. Even the Home Guard personnel who were posted on duty in the very area, where the incident had taken place, have not clearly or whole-heartedly supported the case of the prosecution. Version of the police witnesses before the trial court was nothing but a face saving exercise as they had failed in preventing the unfortunate incident. It is submitted that undispuedly there was no curfew on that day at the time of the incident and the

people were at liberty to move and that the fixed point personnel in the area where the incident had taken place were also on duty. In such situation, there was no reason for the trial Judge to believe the police officer who claimed to be a person present when the incident had occurred. On the contrary, it emerges that after the occurrence of the incident, some report perhaps was received by the policeman who was on mobile duty and therefore, that mobile van had reached at the spot of the incident. It was submitted that when the injured himself has not supported the case of the prosecution nor any other person who could be said to be an independent or reliable witness has supported the case of the prosecution, the learned trial Judge ought to have acquitted the accused at least by giving benefit of doubt to them. It was submitted that the recovery of the weapon is also found fishy; that there are two different panchnamas in respect of recovery of one of the weapons and there is no cogent evidence forthcoming as to

the recovery of the motorcycle. It was submitted that substrata of the story of the prosecution has not been satisfactorily established by cogent and convincing evidence and therefore, the accused persons should be acquitted by reversing the finding of guilt recorded by the learned trial Judge.

5. Ms. Darshana S. Pandit, learned Additional Public Prosecutor has resisted the submissions made by Mr. Patel. Summary of the submissions made by Ms. Pandit is that the learned trial Judge has rightly believed the police witnesses, because, their presence at the spot of the incident appears to be natural; that none of these police officials bore any animosity against the accused and therefore, there was no reason for the police to implicate these number of persons in the crime; that the police witnesses have been shown as eye witnesses of the incident from the beginning; that merely because the injured himself has not supported the prosecution the Court cannot ignore to link the accused with the crime; that the case of

rioting is the offence against the State and not against any single individual and when one of the police witnesses has stated the details of the incident in consistent manner, there was no reason for the trial Judge to discard the evidence of these witnesses; that the submission of Mr. Patel that the appellants were known figures and leaders cuts the case of the defence, meaning thereby, the police also could have noticed their presence as they were known figures and therefore, their names were disclosed in the statements recorded by the Investigating Officer and no police personnel would try to implicate a leader in such serious crime if they were not really there. It is submitted that account of the assault has been given by the police witnesses. If the Court is not ready to believe the discovery, then, the recovery in such similar cases can be said to be sufficient evidence. The case of original accused no.4, that is, Nipunchandra @ Montu, even if defence plea is considered, can be said to be a weak case. It is submitted that keeping

the weakness of the defence side apart, prosecution was under an obligation to prove the guilt beyond reasonable doubt and that attempt was made by the prosecution. It is submitted that there is no confusion as to the identity of the accused persons. It is the say of the prosecution that the victim was intercepted by a mob which was interested in seeing the success of Bharat Bandh Call given by a political party. It is submitted that this is a case where the learned trial Judge ought to have issued notices against the Home Guard personnel and could have also prosecuted those who have not supported the case of the prosecution. It is submitted that merely because the police officer had failed in recording the complaint instantaneously would not make the case that of a delayed FIR. It is submitted that one responsible officer had rushed to Bharuch where the victim was taken for treatment. In such case, if the police officer desires to have a complaint from the person who was a victim, then, this gesture cannot be said to be unwarranted. It was

submitted that for the sake of argument, even if it is accepted that the victim has not named any of the accused persons as assailant when it was possible for him to name the assailant and to identify him in the Court, at least, conviction under Sections 143, 147 and 148 of IPC should be upheld. In response to the query raised by the Court, Ms. Pandit has accepted that as such there is no cogent and convincing evidence so far as the offence punishable under Section 397 of I.P.C. is concerned.

6. To evaluate the rival submissions made before the Court, it would be beneficial to state the first basic facts that were placed before the Court and the contents of final report submitted under Section 173 of the Code of Criminal Procedure, because, Charge-exh. 4 obviously has been framed on the strength of these two documents, namely, FIR and final report. FIR is at exh. 54. PW 17 Victim Aslambhai Hanifbhai, exh. 53 is the complainant-injured and in his evidence FIR was given exh. 54. It is the say of the prosecution that on 26th September, 2002, PW

17-the complainant was at his residence, but in the evening at about 7.00 p.m., he came out of his house as he was intending to purchase toast [kind of a bakery product]. Therefore, he started on his motorcycle of Suzuki make bearing registration no. GJ 60 J 9195. He had reached near the tower, which is situated in the town of Amod. There, one shopkeeper was keeping his shop half closed and from that shop, the complainant had purchased biscuits worth Rs. 22/-. The complainant put the same in the dickey of the motorcycle and was returning home through the main Bagasiya Chora area. When he reached near a barber shop, original accused no.4 Montu as mentioned in the FIR, was standing there with his friends. It is the say of the prosecution that the victim-complainant felt that he may be harassed and therefore, he tried to take “U” turn so that he could return back through the same route. But as the road was so short, that he could not successfully take the turn and at that time, accused persons, including Montu assaulted the complainant. At that time, accused

Paresh Mehta, that is, original accused no. 7 of Sessions Case No. 5/04 had iron chain with him. The said accused gave a blow near the neck of the complainant. Thereafter, rest of the accused had caught hold of the complainant and had taken him of the motorcycle and had given fist blows. At that time, accused Montu took out a knife from his waist and gave blows on various parts of the body of the complainant including chest, abdomen and right side of his body. Blows were also given on the left thigh. Details of various parts of the body where the complainant was given knife blows have been described in the complaint exh. 54. It is the say of the prosecution that nobody who was in the vicinity came to the rescue of the complainant under fear and the complainant was bleeding. At that time, one police van came and the complainant was taken to the hospital in the said police van. However, looking to the condition of the injured, the injured-complainant was referred to Bharuch Welfare Hospital. It is alleged that on arrival of the

police on the spot in police jeep, the accused persons escaped from the scene of offence. It is further say of the prosecution that the accused Montu, that is, the original accused no.2 of Sessions Case No. 5 of 2005 had some quarrel with the complainant before about six months and therefore, the complainant was targeted. According to the prosecution, detailed complaint has been registered in Bharuch Welfare Hospital by Police Sub Inspector Shri Basiya and thereafter, investigation was put into motion.

7. The learned trial Judge has mentioned the details of oral as well as documentary evidence led during the course of the trial. Total 14 panch witnesses have been examined and on evaluation of their evidence, it is found that all these witnesses have been declared hostile rightly by the prosecution and therefore, evidence of all these witnesses does not carry the case of the prosecution any further. True it is, that if any part of the evidence even of a hostile panch witness is found helpful to the prosecution, the prosecution can take advantage

of that fact situation but on a close reading of the evidence of these witnesses, it is not possible for me to say that evidence of any of these panch witnesses is useful in bringing home the charge beyond doubt. On the contrary, the evidence of the panch witnesses who have been examined as panch witnesses and discovery or recovery panchnama creates shadow of doubt otherwise, there could not have been two different panchnamas for recovery of iron chain, described as cycle chain. One such panchnama is at exh. 35 and second panchnama is at exh. 44. It is not the case of the prosecution that more than one accused persons were holding such cycle chain. In both the panchnamas, it is claimed by the prosecution that accused Paresh Mehta had pointed out the place, meaning thereby, both the chains are claimed to have been recovered at the instance of one accused. In this situation, the hostility shown by the panch witnesses exposes independence and transparency of the investigation that was made in the present case.

8. It is rightly argued by Mr. Patel that the evidence of Medical Officer Dr. Anilkumar B. Chaudhari of Amod Community Health Centre and Dr. Jamir Farooqui, of Bharuch Welfare Hospital would not be useful to the prosecution because, evidence of these two witnesses is an opinion evidence. It can either corroborate the prosecution witness or can contradict the witnesses examined by the prosecution. Here, injured Aslambhai, when has not said that who was the author of the injuries that were found on his body, the above opinion evidence also would not carry the prosecution case any further. The learned trial Judge could not have used the medical evidence to link the accused with the crime punishable under Section 397 or 307 of I.P.C. In absence of the first basic evidence from the injured or the victim of the assailant, the evidence led by medical officers can be said to be irrelevant. True it is, that the basic case put up by the prosecution has been brought on record in the nature of contradiction that have been brought on records

and proved by the prosecution. But such evidence cannot be used as a substantive piece of evidence.

9. Provision of sub-section [2] inserted in Section 154 of the Evidence Act with effect from 16.4.06 would not help the prosecution considering the date of its insertion. In the present case, the trial had concluded way back in the year 2004. Academically, the scheme of sub-section [2] of Section 154 of the Evidence Act confers privilege in favour of a party who is called as a witness to support his case. But the scheme of sub-section [2] would not make evidence brought in nature of contradictions a substantive piece of evidence.

10. Evidence of the Executive Magistrate Mr. Bhikhabhai Raisangbhai Vasava, PW 21 exh.58 also would not help the case of the prosecution, because, the injured Aslambhai has ultimately survived. Therefore, effect of his statement is nothing but a statement of a living person and therefore, same can be used only for the purpose of either contradicting PW 17 Aslam or to seek

corroboration to the version of PW 17 Aslam. Therefore, to evaluate the strength of the evidence of PW 17 Aslam, his statement only could have been used. In the same way, PWs 18, 19 and 20, namely, Hasanbhai Ibrahimbhai, Harunbhai Hasanbhai and Hanifbhai Ibrahimbhai have not supported the case of the prosecution. On the contrary, their version impliedly gives an impression that perhaps complainant Aslam was right in narrating the incident. According to the complainant, actually when he reached at Bagasiya Chora, he was cornered by a mob and the persons in the mob had assaulted him by intercepting him and consequently he sustained number of injuries, including the injury by a sharp cutting instrument like knife. It is required to be noted that his condition was never serious and had never become unconscious. There is nothing on record to show that he was required blood transfusion otherwise, the doctors could have said that blood transfusion was done. In this situation, it was possible to get at the basic clue as to the criminal's

involvement in the crime at the time when the complainant was being treated in the Community Health Centre at Amod.

11. PW 25 Exh. 67 Shantilal Manilal Pandya, PW 28 exh.71 Jesingbhai Madhubhai and PW 29 exh.72 Kishorbhai Manharbhai were the persons on duty in capacity of Home Guards. As it was the day of Bharat Bandh Call, it is very likely that they might have been called by local police for maintenance of law and order. Unfortunately, none of these persons have supported even the police witnesses examined during the course of the trial. Surprisingly, the learned trial Judge has not ordered any action against those Home Guards personnel. Similarly, most important witness examined by prosecution and that too a police witness namely, PW 22 exh.61 ASI Shri Maganbhai Hirabhai also has not supported the case of the prosecution in its entirety. Therefore, without declaring this ASI Maganbhai Hirabhai hostile, the learned trial Judge has permitted the learned Public Prosecutor to put certain questions to him that can be asked only

during the cross-examination. It is the privilege of the learned trial Judge to permit a party to put such questions that can be asked in the cross-examination only, so that the witness can be confronted to some extent. On material aspects, this witness has been cross-examined in detail and despite that no fruitful facts have come on record. At least, a departmental action against this ASI Shri Maganbhai Hirabhai could have been proposed by the learned trial Judge while evaluating the evidence of the witness. Merely because, the Court is able to reach to a conclusion that prosecution has successfully established the charge beyond reasonable doubt, no leeway should have been given to such persons who were supposed to perform their duties with utmost integrity and devotion. It appears that the day on which statement of ASI Maganbhai was recorded by the Investigating Officer, he has done some face saving exercise and therefore, he could not give correct version before the Court on the date on which his deposition came to be

recorded. This situation needs to be considered vis-a-vis conduct and duty performed by P.S.I. Shri Basia. There are material contradictions in the version of the police personnel who were on duty entrusted with requisited vehicle which was converted into mobile van of P.S.I. Basia. It is not even clear from the plain reading of the evidence of these two witnesses, namely, Mr. Basia and the person in Charge of mobile van that whether any wireless message was sent to Amod Police Station or not and therefore, the facts stated by the witness that wireless message was sent to Amod Police Station, have emerged as a cock and bull story, otherwise, PSI Shri Basia could have reached the spot in a couple of minutes. Amod is a small town and Community Health Centre of Amod must not be that far. After how many hours or minutes and after which type of treatment, the injured was referred to Bharuch Hospital are the questions to be considered. According to me, it is difficult to find reasonably good answers from the set of evidence led in the present case.

Evidence of P.S.I. Samantbhai Basia exh. 74 has been rightly assailed by Mr. Patel that this officer has not acted transparently prior to recording of the complaint in the present case nor in investigating the crime. Number of lacunas have been left in the investigation. It appears that as he was not able to get name of the persons-assailants, he must have decided to pick persons who were responsible for giving Bharat Bandh Call in Amod town or persons, who were interested in seeing the success of Bharat Bandh Call. It was 7.00 p.m. in the evening whereas Bandh Call normally remains effective up to 6.00 p.m. or 6.30 p.m. It appears that only because of that, the persons who were on duty on a fixed point were not found present on the spot, otherwise, they could have prevented the occurrence of crime. Surprisingly, the mobile van reached earlier in point of time rather than the persons who were actually posted at the spot of duty. Therefore, the witnesses examined by prosecution who were posted at that fixed point created in Bagasiya Chora have decided to

support the case of the prosecution. Who could be the creator of the story implicating these number of persons is also a question to be considered. However, as per the law of the land, accused are not supposed to answer such questions or situation. It is the duty of the prosecution to prove the case beyond doubt. Recording of the complaint at belated stage and registering of crime again after some hours had provided ample opportunity to police in carving out a case against five to seven persons. Simple query put to Aslambhai, while he was taking treatment by PSI Shri Basia that whether any person was inimical to him, Aslam might have stated that Montu, the accused person had some quarrel with him six months before. Injured Aslam has not been posed as a leader or person active in the politics. True it that Aslam had no inimical terms with any of the accused other than accused Montu. This story may be a creation of the police. It is well settled principle that the victim normally would not leave real culprit and he may implicate some

persons falsely along with the real culprit. But in the present case, the complainant has not pointed out finger towards any one of the accused. It is also settled that some persons at the spot of the incident would not make a person a member of unlawful assembly. There must be some act or omission otherwise, membership of an unlawful assembly cannot be conferred on account of mere presence is the law. It is clear from the evidence that the police van must have reached after the incident and perhaps at the instance of the persons who were on duty at the fixed point. While arranging the sequence of evidence, the Investigating Officer fumbled and ultimately committed an error otherwise, there was no reason for him for not recording statement of such important witness till the next day. Surprisingly, statements of important eye witnesses have not been recorded on the same day. It is clear from the final report submitted that evidence of eye witness Shri Maksud Ibrahim Patel was recorded on 28th September and similarly, the statement of

witness Hanif Ibrahim was also recorded on 28th September. The incident is of 26th September and PSI Basia was the first person who could know that which police personnel were on duty and who have witnessed the crime. On 26th instant, statement of police officials who were on fixed point duty and who were members of the mobile van that had reached to the spot could have been recorded. A crucial question that could have been addressed by the learned trial Judge is that whether it was possible for any of the police personnel to be a complainant when it was a case of rioting. All police personnel were present at Amod, who claim that they were witnesses to the incident and one of them was ASI who was Head Constable and that they were knowing the accused persons. It is their say that these particular number of persons had assaulted the injured Aslam and the incident had taken place before them, then, any one could have rushed to Amod police station and complaint could have been lodged. Therefore, time taken by the police in registering the

complaint appears to be unreasonable and more than what was required. It is a legal position that the offence should be registered at the earliest and at the first available opportunity. Fortunately, victim Aslam has survived. But before PSI Basia could reach Bharuch Welfare Hospital, if Aslam had gone into coma then what would have happened to such serious or sensitive case, has not been perhaps thought over by PSI Basia. He ought not to have left Amod police station before recording the complaint from the police officer if they had really witnessed the incident. Therefore, it is not possible for this Court to disagree with the argument made by Mr. Patel that these police witnesses are created witnesses and they have been planted at the spot of the incident otherwise, it was possible for Mr. Basia to produce relevant record of distribution of duties. In this regard, guidelines are issued and it is a practice being followed by each police station to maintain the record about distribution of duties to the police personnel

and Home Guard personnel, if they are called by the local police. When no such record was produced on the record, there was no reason for the trial court to believe the police witnesses.

12. The Court is not concerned with the submissions made by Mr. Patel that as injured Aslam was convinced that real assailants were others and he was not able to identify them, the matter was compounded between the parties prior to initiation of trial. The fact remains that injured Aslam has not supported the case of the prosecution nor any witnesses who were examined by the prosecution have supported Aslam. Evidence of Home Guard witnesses affects adversely the evidence of police witnesses. Therefore, as discussed earlier, it is not safe for this Court to endorse the view taken by the learned trial Judge.

13. This is a case where the learned trial Judge ought to have observed that it is not safe for the Court to rely upon the evidence of the police witnesses. The finding recorded by the

learned trial Judge is based on erroneous and illegal interpretation and appreciation of evidence. Some inadmissible evidence has also been considered in arriving at the final conclusion. Therefore, such finding cannot sustain in the eye of law.

14. For the reasons aforesaid, both the appeals are allowed. Judgment and order of conviction and sentence rendered in Sessions Case No. 4 & 5 of 2004 by the learned Joint District and Additional Sessions Judge, Fast Track Court No. 5, Bharuch, on 27th August, 2004 is hereby quashed and set aside. The appellants-accused in both the appeals are acquitted from the charges levelled against them and the appellants are ordered to be set at liberty, if not required in any other case. Bail bond executed by the accused shall stand discharged. Amount of fine, if paid, shall be refunded to them on proper identification. Order and direction accordingly.

15. The accused who has been granted temporary bail obviously now would not have to surrender to the jail authority as he has been acquitted

by this judgment and order.

16. Before parting with the order, the Court is inclined to observe that PW 22 Maganbhai Hirabhai, who has deposed in a tricky manner and other prosecution witness, namely Police Constable Rameshbhai Chimanbhai, who has conveniently supported the defence side while answering the questions posed by the defence counsel, require to be dealt with departmentally. It is hereby directed that Home Department shall scrutinize the case and take appropriate decision whether to initiate departmental action or not. It is clarified that in such or similar cases, the Courts conducting the trial should make necessary observations and should assign reasons if the trial Judge is not inclined to pass such harsh orders against a Government servant. Similarly, District Commandant of Home Guards of District Bharuch is also directed to see that the witnesses who have turned hostile in the present case and who have failed in supporting the case of the prosecution may not be assigned any duties during the very

sensitive situation like communal disturbances etc. Normal work can be taken from them like maintenance of traffic etc. Copy of this judgment be sent to the District Superintendent of Police, Bharuch and District Home Guards Commandant, Bharuch. Learned APP for the State Ms. Pandit also shall inform the Home Department about the observations made by this Court so that the State Government can have supervision over the steps that may be taken by the two respective district heads.

[C.K. BUCH, J.]

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